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MAR 10 1958
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IN THE

Supreme Court of the United States

October Term, 1957

No. 816

THE NEW YORKER MAGAZINE, INC.,
Appellant,

—v.—

LAWRENCE E. GEROSA, as Comptroller of the City of New York, and GEORGE M. BRAGALINI, as Treasurer of the City of New York,
Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF FOR THE HEARST CORPORATION AND TIME, INCORPORATED, AS *AMICI CURIAE*

ALFRED H. WASSERSTROM
959 Eighth Avenue
New York 19, New York
Attorney for The Hearst Corporation

GEORGE G. TYLER
15 Broad Street
New York 5, New York
Attorney for Time, Incorporated

WILLIAM MEYERSON
Of Counsel for The Hearst Corporation

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Pursuant to Rule 42, and with the consent of all parties, The Hearst Corporation and Time, Incorporated, respectfully submit this brief as *amici curiae* urging that this Court take jurisdiction of the appeal.

The *amici curiae*, like the appellant, are publishers of national magazines which are largely prepared, printed and circulated outside the City and State of New York, but maintain advertising and editorial offices in New York City among other places. As in appellant's case, the New York City gross receipts tax statutes have been applied to these magazines so as to tax the great bulk of their advertising receipts—namely, all receipts from advertising contracts solicited or procured by agents based at the magazine's New York office—without apportionment for their activities, property and circulation outside of New York City and State.

Like the appellant, the *amici* have unsuccessfully argued to the appellees that the local statutes, as thus applied, transgress the commerce clause. The issue is posed in pending claims for refund by Time, Incorporated, for all years since 1948 and in disputed assessments upon The Hearst Corporation for the years since 1950. An authoritative ruling by this Court on the instant appeal will resolve a problem which is widespread and repetitive in its impact.

Considering only the operations of the two publishers for which this brief is filed, the present case affects magazines with a combined circulation of over 15,000,000. We set forth in Appendices hereto the circulation and other pertinent figures for eleven of these magazines, all of which are printed and partly prepared outside of New York City and State. In all cases, the magazines are shipped directly from out-of-state contract printing plants to subscribers or newsdealers, most of whom are also outside New York City and State. As the figures show, the tax asserted by New York City reaches large amounts of gross receipts attributable solely to interstate activities and in no sense fairly attributable to activities in New York.*

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* Cowles Magazines, Inc., publisher of LOOK, has informed the *amici* that it, too, is directly affected by the problem in this case. Cowles Magazines, Inc., is an Iowa corporation whose entire subscription operation is maintained at its home office in Des Moines. It has nine branch advertising offices outside of New York State but maintains editorial, executive and advertising offices in New York City. Like the magazines of appellant and these *amici*, LOOK is printed outside New York State by an independent contract printer. Approximately 94% of LOOK's circulation for the five-year period 1952-1956 was outside New York City and approximately 88% was outside New York State. The City tax was levied upon an average of approximately 44.5% of the LOOK gross advertising receipts during that period. The Comptroller has set for hearing on March 18, 1958, claims by Cowles Magazine, Inc., for tax refunds covering the years 1953-1955 and deficiency claims by the City covering the years 1952-1954.

The appellant has made and documented the point, which is in any event common knowledge, that the essence of magazine advertising is delivery of the advertiser's message to the readers. The record shows, too, that in their sales of this service magazines compete with such media as radio and television. It seems perfectly clear that today there can be no economic or constitutional justification for New York City's denial to national magazines of the apportionment which is accorded to radio and television broadcasters and other taxpayers engaged in interstate commerce.

For reasons the appellant has outlined—reasons which merit fuller presentation and consideration by this Court on a hearing of this appeal—the decision in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, cannot fairly be read as adequate authority for the City's discriminatory scheme of taxation. On the contrary, the principles of *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, and *Fisher's Blend Station* v. *State Tax Commission*, 297 U. S. 650, are squarely opposed to the ruling below. Moreover, there is a substantial question whether it is possible in the light of today's economic realities to square the *Western Live Stock* decision with *Fisher's Blend*.

In any event, it bears emphasis that the case in *Western Live Stock* was made only by pleadings, and that the small publication there involved appeared from those pleadings to be in fact essentially local in character. In the present case, a substantial record of testimony and exhibits illustrates the truly and exclusively interstate (and international) nature of advertising in national publications like those of the appellant and the *amici*.

It is incongruous that a decision a generation ago, on a sketchy record of wholly different facts, should be held

decisive today in a case like this one. The appellant correctly asserts that the New York Court of Appeals has erred in its uncritical reliance upon an inapposite precedent. At the least, it is submitted, the problem is one of sufficient difficulty and general importance to warrant full examination by this Court.

Accordingly, these *amici* urge with appellant that this Court should note probable jurisdiction of the appeal.

Respectfully submitted,

ALFRED H. WASSERSTROM
Attorney for The Hearst Corporation

GEORGE G. TYLER
Attorney for Time, Incorporated

WILLIAM MEYERSON
Of Counsel for The Hearst Corporation

APPENDIX A

Hearst Corporation Publications

Circulation Figures and Percentages of Gross Receipts Taxed by New York City

	1950	*1951*	*1952*	*1953*	*1954*
I. COSMOPOLITAN					
A. Circulation					
(1) Within New York City	116,479	108,575	85,387	85,411	53,700
(2) Within New York State	228,036	212,381	190,319	175,272	118,199
(3) Outside New York State	1,744,595	1,789,865	1,675,550	1,527,905	1,052,093
B. Percentage of Circulation					
(1) Within New York City	5.79%	5.20%	4.70%	4.70%	4.67%
(2) Within New York State	11.56%	10.60%	10.20%	10.30%	10.10%
(3) Outside New York State	88.44%	89.40%	89.80%	89.70%	89.90%
II. GOOD HOUSEKEEPING					
A. Circulation					
(1) Within New York City	122,422	133,629	140,735	144,221	140,224
(2) Within New York State	296,873	304,498	319,429	340,613	345,311
(3) Outside New York State	2,714,010	2,777,462	2,881,261	3,072,342	3,097,473
B. Percentage of Circulation					
(1) Within New York City	4.02%	4.02%	3.90%	3.93%	3.85%
(2) Within New York State	9.86%	9.88%	9.98%	9.98%	10.03%
(3) Outside New York State	90.14%	90.12%	90.02%	90.02%	89.07%
III. MOTOR					
A. Circulation					
(1) Within New York City	2,227	2,256	2,225	2,271	2,234
(2) Within New York State	6,783	7,003	7,126	7,156	7,377
(3) Outside New York State	61,594	65,565	71,703	73,886	75,514
B. Percentage of Circulation					
(1) Within New York City	3.13%	2.92%	2.77%	2.76%	2.66%
(2) Within New York State	9.92%	9.65%	9.04%	8.83%	8.90%
(3) Outside New York State	90.08%	90.35%	90.96%	91.17%	91.10%

IV. Motor Boating

A. Circulation					
(1) Within New York City	5,364	3,517	3,636	3,800	3,320
(2) Within New York State	7,919	7,937	8,244	8,651	9,301
(3) Outside New York State	37,700	38,208	42,023	44,748	48,468
B. Percentage of Circulation					
(1) Within New York City	10.40%	6.70%	6.40%	5.90%	4.90%
(2) Within New York State	17.36%	17.20%	16.40%	16.20%	16.10%
(3) Outside New York State	82.64%	82.80%	83.60%	83.80%	83.90%

V. Harper's Bazaar

A. Circulation					
(1) Within New York City	41,028	39,604	41,053	40,241	38,716
(2) Within New York State	51,986	51,106	52,201	51,196	50,948
(3) Outside New York State	290,026	298,933	307,807	311,894	300,415
B. Percentage of Circulation					
(1) Within New York City	10.90%	10.40%	9.99%	9.78%	9.76%
(2) Within New York State	15.20%	14.60%	14.50%	14.10%	14.50%
(3) Outside New York State	84.80%	85.40%	85.50%	85.90%	85.50%

VI. Town & Country

A. Circulation					
(1) Within New York City	9,090	9,265	8,893	8,712	8,314
(2) Within New York State	10,986	11,663	12,488	11,615	11,059
(3) Outside New York State	43,671	52,422	55,291	55,138	55,946
B. Percentage of Circulation					
(1) Within New York City	14.10%	14.40%	13.90%	12.80%	11.90%
(2) Within New York State	20.10%	18.20%	18.70%	17.40%	16.50%
(3) Outside New York State	79.90%	81.80%	81.30%	82.60%	83.50%

	1950	1951	1952	1953	1954
VII. House Beautiful					
A. Circulation					
(1) Within New York City	37,982	38,872	39,023	39,238	42,076
(2) Within New York State	71,861	68,801	70,147	69,645	72,207
(3) Outside New York State	489,551	514,249	539,826	541,275	550,270
B. Percentage of Circulation					
(1) Within New York City	6.80%	6.50%	5.90%	5.87%	5.99%
(2) Within New York State	12.80%	11.80%	11.50%	11.40%	11.60%
(3) Outside New York State	87.20%	88.20%	88.50%	88.60%	88.40%
VIII. Sports Afield					
A Circulation					
(1) Within New York City	—	—	—	10,008	10,326
(2) Within New York State	—	—	—	55,623	57,587
(3) Outside New York State	—	—	—	783,338	800,635
B. Percentage of Circulation					
(1) Within New York City	—	—	—	1.16%	1.12%
(2) Within New York State	—	—	—	6.63%	6.71%
(3) Outside New York State	—	—	—	93.37%	93.29%
IX. Totals for Eight Magazines					
A. Circulation					
(1) Within New York City	334,592	335,718	320,952	333,902	298,910
(2) Within New York State	689,126	705,964	722,337	775,063	721,164
(3) Outside New York State	5,366,465	5,492,139	5,510,078	6,357,907	5,931,639
B. Percentage of Circulation					
(1) Within New York City	5.53%	5.42%	5.15%	4.69%	4.49%
(2) Within New York State	11.38%	11.39%	11.59%	10.87%	10.84%
(3) Outside New York State	88.62%	88.61%	88.41%	89.13%	89.16%
C. Percentage of gross advertising receipts upon which City has imposed tax	61.65%	71.54%	73.73%	66.78%	70.63%

APPENDIX B

Time, Incorporated, Publications*

Circulation Figures and Percentages of Gross Receipts Taxed by New York City

	1948	1949	1950	1951	1952	1953	1954	1955	1956
I. TIME (Domestic Edition)									
A. Circulation									
(1) Within New York City	90,600	82,300	81,100	81,400	84,700	86,300	101,100	102,800	102,100
(2) Within New York State	177,900	170,300	175,300	177,700	184,400	191,400	212,700	219,900	231,100
(3) Outside New York State	1,469,600	1,383,200	1,414,100	1,483,900	1,509,500	1,569,500	1,659,600	1,720,100	1,811,800
B. Percentage of Circulation									
(1) Within New York City	5.5%	5.3%	5.1%	4.9%	5.0%	4.9%	5.4%	5.3%	5.0%
(2) Within New York State	10.80%	10.96%	11.03%	10.69%	10.89%	10.87%	11.36%	11.33%	11.31%
(3) Outside New York State	89.20%	89.04%	88.97%	89.31%	89.11%	89.13%	88.64%	88.67%	88.69%
C. Percentage of gross advertising receipts upon which City has imposed tax	41.6%	40.2%	40.0%	39.5%	39.2%	43.5%	44.9%	44.5%	44.4%
II. LIFE (Domestic Edition)									
A. Circulation									
(1) Within New York City	343,200	363,400	323,000	306,400	290,300	307,200	310,100	355,800	332,800
(2) Within New York State	668,600	693,900	659,700	635,100	623,700	642,300	652,300	711,600	715,000
(3) Outside New York State	4,694,000	4,729,500	4,635,100	4,740,100	4,752,000	4,943,600	4,985,500	5,027,000	5,023,500
B. Percentage of Circulation									
(1) Within New York City	6.4%	6.7%	6.1%	5.7%	5.4%	5.5%	5.5%	6.2%	5.8%
(2) Within New York State	12.47%	12.79%	12.46%	11.81%	11.60%	11.50%	11.57%	12.40%	12.46%
(3) Outside New York State	87.53%	87.21%	87.54%	88.19%	88.40%	88.50%	88.43%	87.60%	87.54%
C. Percentage of gross advertising receipts upon which City has imposed tax	53.4%	51.8%	48.0%	47.4%	47.2%	48.1%	46.5%	45.3%	46.4%
III. FORTUNE									
A. Circulation									
(1) Within New York City	18,100	17,900	17,300	16,200	16,500	16,300	17,100	17,400	16,500
(2) Within New York State	31,800	31,800	32,200	29,900	31,400	31,100	32,800	34,600	36,900
(3) Outside New York State	212,800	213,100	218,300	212,200	218,200	212,300	218,900	232,600	247,400
B. Percentage of Circulation									
(1) Within New York City	7.4%	7.3%	6.9%	6.7%	6.6%	6.6%	6.8%	6.5%	5.8%
(2) Within New York State	13.00%	12.99%	12.87%	12.36%	12.57%	12.79%	13.03%	12.96%	12.97%
(3) Outside New York State	87.00%	87.01%	87.13%	87.64%	87.43%	87.21%	86.97%	87.04%	87.03%
C. Percentage of gross advertising receipts upon which City has imposed tax	40.4%	36.6%	37.6%	38.2%	37.2%	37.9%	40.8%	43.8%	42.5%

* Information as to the application of the City tax to the relatively smaller advertising revenues of other Time, Incorporated, publications, including the foreign editions of TIME and LIFE, has been omitted.